Supreme Court, U.S.
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No. 99-1958

In The

Supreme Court of the United States

YUKON RECOVERY, L.L.C.,

Petitioner,

v.

OCEAN MAR, INC.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

1. This Petition involves the proper construction of the Abandoned Shipwreck Act (ASA), 43 U.S.C. §§ 2101-06, particularly the standard of abandonment under the Act and the relative burdens of proof to be assigned in such a case. Respondent challenges this characterization (Pet. Reply 5), and relies on the stipulations entered into by the State of Alaska with both of the contesting parties in the case. Ocean Mar suggests that because Alaska has apparently waived its rights to the cargo of the The SS ISLANDER, the ASA is not implicated here. Respondent's view is mistaken.

For starters, the Ninth Circuit expressly based its decision on the ASA and its standard of abandonment. See Pet. App. 7a-8a & n.3, 10a-12a. Moreover, Ocean Mar's stipulation with Alaska is premised on the factual assumption that the gold carried on board The ISLANDER "is the property of the Marine Insurance Company [MIC], Ltd." Pet. Reply App. 2a (¶ a). That assumption is precisely what is at issue in this case: MIC's continued claim by subrogation to cargo aboard The ISLANDER, despite the facts that MIC had no documentary evidence that it even insured the cargo and that MIC did not object to subsequent salvage efforts by unrelated parties. Lastly, as Respondent concedes (Pet. Reply 6), under Alaska's stipulation with Ocean Mar, Alaska continues to assert a claim to gold not ostensibly owned by MIC. See Pet. Reply App. 3a (¶ d). The proper construction of the ASA's standard of abandonment is fully joined here.

2. Respondent also argues that there is an independent basis for decision below, one that would render this Court's review of the case futile. This, too, is mistaken. The courts below certainly did not base Ocean Mar's rights on its putative

status as the first finder of The ISLANDER. Rather, both the District Court and Ninth Circuit hinged their decisions on a ruling that Ocean Mar had acquired a valid salvage claim from MIC. See App. 9a ("The premise of Yukon's first argument is untenable because the district court's finding regarding abandonment is undisturbed on appeal"); 27a ("The court concludes that the arrest of light fixture does not, in and of itself, afford Yukon Recovery any legal status which is entitled to preference or legal priority over a contract salvor of cargo such as Ocean Mar."); 28a ("The court concludes as a matter of law that a contract salvor should be preferred over one such as Yukon Recovery which has no rights as regards the wreckage site beyond those associated with the arrest of the light fixture.").

It was only because the lower courts ruled that Ocean Mar was a contract salvor for MIC's gold, that they were prepared also to extend Ocean Mar's rights as a finder to gold not under a subrogation claim by MIC. If this Court were to concur with Yukon's submission that MIC had abandoned any interest it had in gold on board The ISLANDER, it logically follows that Ocean Mar can take nothing from its salvage contract with MIC. Ocean Mar can simply have no rights as a contract salvor of The ISLANDER if MIC is no longer an owner of property on board the vessel. The lower courts' rulings that Ocean Mar is the salvor-in-possession of The ISLANDER, based on its status as a contract salvor, should thus be reversed or vacated. In this event, the Court might properly remand for further proceedings. The district court should be given the opportunity to review its decision that Ocean Mar was the exclusive salvor-in-possession of The ISLANDER.

3. Lastly, Respondent intimates that the issue presented here is not worthy of the Court's review. But in the time since this Petition has been filed, two new opinions have issued from

the Courts of Appeals that further sharpen the manifest divisions in lower court interpretations of the ASA and the general maritime law's standard of abandonment.

In *International Aircraft Recovery, L.L.C. v. Unidentified Wrecked and Abandoned Aircraft*, 2000 WL 977396 (11th Cir. July 17, 2000), the Eleventh Circuit apparently embraced the Fourth Circuit's extreme test of express abandonment for property lost at sea. See id. at *2 ("Admiralty law presumes that owners do not give up title to ships and cargo in marine peril . . . .") (citing *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 460 (4th Cir. 1992)).[1] As Petitioner earlier noted, Pet. 17, the Ninth Circuit's analysis in this case essentially replicated the express abandonment standard articulated by the Fourth Circuit, and now joined by the Eleventh.

More disturbingly, in *Sea Hunt, Inc. v. Unidentified Shipwrecked Vessel or Vessels*, 2000 WL 1015814 (4th Cir. July 21, 2000), the Fourth Circuit applied *Columbus-America*'s express abandonment standard in order to oust State title to a wreck situated in State waters and thus governed by the ASA. See id. at *3. And while the Fourth Circuit attempted in *Sea Hunt* to harmonize its express abandonment standard with the test employed by the First, Fifth and Sixth Circuits, see id. at *5, it appeared to acknowledge the manifest split in authority. The *Sea Hunt* opinion also relied upon the Ninth Circuit's *Yukon* decision in its analysis of whether subsequent improvements in salvage technology and whether the actual undertaking of salvage efforts were to be regarded as evidence of abandonment or not. See id. at *11. These issues are fully presented in this

[1] The later proceedings in *Columbus-America* are now before this Court in Petition Docket No. 99-1935.

Petition.

As Petitioner earlier predicted, Pet. 18-19, the split in the Circuits is growing – not narrowing – on these significant issues of the ASA's construction and the standard of abandonment under the general maritime law.

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For the foregoing reasons, and those previously articulated, the Petition should be GRANTED.

Respectfully submitted.

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